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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 756

JOE J. FISHER, *Petitioner*,

v.

R. C. PACE, SHERIFF OF JASPER COUNTY, TEXAS, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

ROBERT W. HILLEN,
District Attorney, Jasper County, Texas,
Jasper, Texas;

QUENTIN KEITH,
Perlstein Bldg.,
Beaumont, Texas,
Attorneys for Respondent

ALPHA LAW BRIEF CO., HOUSTON

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The Trial Court's order was " * * * that he, the said Joe J. Fisher, is guilty of contempt of Court in so refusing to abide the ruling of the Court and in arguing with the Court and in manifesting disrespect for the Court, its authority and its orders" (R. 27).

The majority opinion (8 of 9 Judges) of the Supreme Court of Texas is not ambiguous, or susceptible of the interpretation that the Court refused to consider the Record. Its own clear statement of the scope of its inquiring was: "If there is any conduct or behavior of the relator contained in the whole proceedings sufficient to constitute a contempt which was within the power of the court to punish, our inquiry comes to an end." (R. 36-7.) It reviewed Petitioner's conduct, ranging from initial improper jury argument, through determined disobedience of the Trial Court's rulings and orders with respect thereto, and finally to defiant and disrespectful recalcitrance, and found therein sufficient jurisdictional grounds to support the Trial Court's order.

We have, therefore, that class of contempt which MR. JUSTICE HOLMES in CRAIG v. HECHT, 263 U.S. 255, at 280, distinguishes from those involved in cases cited by Petitioner:

> "For we must not confound the power to punish this kind of contempts with the power to overcome and punish disobedience to or defiance of the orders of a court, although unfortunately both are called by the same name. That of course a court may and should use as fully as needed. * * *."

Counterpoints

1. Petitioner never contended to the Supreme Court of Texas that it did not consider the record and find therein sufficient basis, in its judgment, to justify the contempt judgment. (Responsive to Petitioner's Point One.)

2. The Supreme Court of Texas reviewed Petitioner's conduct and found therein cause sufficient

to empower the Trial Court to determine and punish contempt, the Supreme Court's action in this respect satisfying every requirement of due process. (Responsive to Petitioner's Point One.)

3. The Supreme Court of Texas sustained action by the Trial Court, justified by contemptous disregard of that Court's lawful authority and rulings; and the Supreme Court's action in this respect was not offensive to any requirement of due process. (Responsive to Petitioner's Point Two.)

4. Exercise of jurisdiction by this Court to reverse the action of the Court below would constitute an unjustifiable interference in the administration of justice by the Courts of Texas pursuant to the laws of that State, and as a precedent tend strongly toward making difficult the maintenance of order, dignity and decorum in Court proceedings in that and other States. (Responsive to Petitioner's Points One and Two.)

Argument

Our points are so intimately related that to argue one is to argue the others; separate argument would involve repetition.

We have pointed out, in our preliminary statement, that the punishment was for disregard of the Trial Court's orders and rulings, and a refusal to conform to the Trial Court's requirement that Counsel stay within the bounds of propriety. Both Courts below made this point very plain; and the argument that the punishment was for taking an exception, or for improper and personal reasons of the Trial Judge, or some other speculative reason, are contrary both

to the record and the presumptions of right conduct and motivation that should prevail.

Before analyzing the occurrences in the Trial Court, we wish to stress that the Supreme Court analyzed the record and found it reflected contempt within the jurisdiction of the Trial Court to punish. Nothing could be plainer. The dissenting Judge must not have read the majority opinion; indeed it is plain that it is his mistake, in this respect, and not any view of his own, which leads the Petitioner to the assertion of his Point One. *Nowhere, did he assert to the Supreme Court of Texas any such claim.*

The only presentment of Federal question, in the proceedings filed in the Supreme Court, was in Paragraph VII (b) of the Supplemental Petition (R. 6), on a ground not now argued to this Court. In Petitioner's Motion for Rehearing, he disclaimed all challenge to any "single proposition of law set forth in the opinions of the Court", and simply argued that "the majority * * * has viewed the facts * * * other than in their true perspective * * * and solely on this ground * * * *" moved for rehearing (R. 53). In his Supplemental Motion for Rehearing, his grounds II to VI, inclusive, he invokes Federal Law, contending only that the Supreme Court of Texas erred in its conclusions and actions on the facts, and never contending that the Supreme Court violated Federal Law by refusing to consider the facts. Accordingly, Petitioner's afterthought, his Point One, is improperly raised; but were its consideration proper, it is not well taken; for the Supreme Court considered the facts and viewed them substantially as we will shortly present them.

The foregoing is only the beginning of Petitioner's jurisdictional difficulty. Admitting (Brief, 23) that due process does not, as held in DISTRICT OF COLUMBIA v. CLAWANS, 300 U.S. 617, 627, "comprehend the right of appeal", he

complains that the Supreme Court of Texas did not make an independent review of the facts and disagree with the Trial Judge, a scope of review never indulged even in the widest appeal. Essentially, he asserts he was denied due process because he was not allowed an appeal with *de novo* evaluation of the facts, instead of being accorded the traditional jurisdictional inquiry of a *habeas corpus proceeding*.

We submit that the Supreme Court of Texas gave the correct scope of review, and that this Court need and should not inquire as to whether its judgment involves error. As said in BELL TELEPHONE COMPANY OF PENNSYLVANIA v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32:

> "In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The meaning of what transpired in the Trial Court can be understood from the background of Texas law, and the precise situation in the particular trial. The case at issue was a Workmen's Compensation Action, arising under VERNON'S CIVIL STATUTES OF TEXAS, Article 8306, et seq. A jury was sitting. The issues had been narrowed, by stipulation, to the question of the extent and duration of the plaintiff's incapacity resulting from an injury to his foot. Seven special issues designed to elicit an answer to this problem, and no others, were submitted (R. 10-12), with instructions including the following:

> "You are the sole and exclusive judges of the facts

proved, the credibility of the witnesses, and the weight to be given their testimony; but the law you will receive from the Court as contained in this charge and be governed thereby.

"You must not discuss or consider what effect any of your answers may have upon the rights of the parties nor the judgment that may be rendered by the Court in this case, as it will be the duty of the Court to determine those matters."

As pointed out by the Supreme Court of Texas in its opinion in the instant case, EX PARTE FISHER, 206 S.W. (2d) 1000, 1004 (R. 38), special issue submission has as its purpose limiting the jury to decision of disputed facts and preventing them from considering or discussing whether they should render a verdict for one party or the other. The instruction of the Trial Court correctly stated the Texas law.

Any qualified Texas Lawyer, with proper regard for the Law and the Court's Charge, in addressing a jury after the charge had been read (VERNON'S TEXAS RULES OF CIVIL PROCEDURE, Rule 269), would:

Limit his address to the issues submitted, namely the extent and duration of plaintiff's disability, and the evidence bearing thereon.

Refrain from discussing issues, and facts bearing thereon, which the Court's charge, as well as the law, withdrew from the jury's consideration.

Refrain from inviting the jury to disregard the Court's charge by considering issues not before the jury or evidence bearing thereon.

Refrain from arguing to the jury, causing them to disregard the Court's instruction not to consider or discuss such matters, the effect their answers would have upon the rights of the parties or the judgment to be rendered by the Court.

Refrain from urging, directly or by implication, that the jury award the plaintiff compensation measured in either time or money.

With the Court's charge before him, Mr. Fisher's opening remarks were in open disregard thereof, and either a deliberate or ignorant violation of the duty any lawyer owes the profession and the Court in the particulars above summarized. He told the jury the maximum compensation Godfrey might receive under judgment of the Court, and how it would be computed, depending upon their answers (R. 14).

The objection and ruling were:

"By Mr. Cox: The jury is not concerned with the computation; it has only one series of issues. That is not before the jury.

"By the Court: That has all been agreed upon.

"By Mr. Fisher: I think it is material, Your Honor, to tell the jury what the average weekly compensation is of this claimant so they can tell where he is.

"By the Court: They are not interested in dollars and cents.

"By Mr. Fisher: They are interested to this extent—

"By the Court: Don't argue with me. Go ahead. I will give you your exception to it.

"By Mr. Fisher: Note our exception.

"By the Court: All right." (R. 14.)

Note that the objection sustained was that "the jury is not concerned with the computation. That is not before the jury." Counsel knew full well what was before the jury: The Court's charge was in his hand; and he was a competent practicing attorney, fully aware of the requirements of Texas Law and his duty as an officer of the Court. He admitted that his purpose in making the argument was in direct vio-

lation of the Court's charge, to induce the jury to consider the measure and amount of Godfrey's recovery, in his words:

> " * * * to tell the jury what the average weekly compensation is of this claimant so they can tell where he is."

At the close of the foregoing ruling, with proper observance of decorum by the Petitioner, as the Court's officer, the incident should have closed; but it did not. Mr. Fisher's first words thereafter, " * * * This negro, *as I stated,* can recover * * * ", were an incorporation of his previous remarks, which the Court had instructed the jury to disregard, an argument that the jury should disregard the Court's instruction, and an attempt to disobey the Court's ruling previously made. The related text is (R. 14):

> " * * * This negro, as I stated, can only recover one hundred and twenty-five weeks compensation, at whatever compensation the rate will figure under the law.
>
> "By Mr. Cox: I am objecting to that discussion, Your Honor, as to what the plaintiff can recover.
>
> "By the Court: Gentlemen! Mr. Fisher, you know the rule, and I have sustained his objection.
>
> "By Mr. Fisher: I am asking—
>
> "By the Court: Don't argue with me. Gentlemen, don't give any consideration to the statement of Mr. Fisher."

Here again the incident should have ended. The issue was settled a second time, the Court's ruling was made, and though counsel had deliberately disobeyed rulings of the Court, the Court had merely performed his necessary judicial function and warned counsel not to argue about it. The next step is the noting of an exception, an unnecessary pro-

cedure (VERNON'S TEXAS RULES OF CIVIL PROCEDURE, Rule 373), and a disobedience of the Court's instruction not to argue (R. 15):

> "By Mr. Fisher: Note our exception. I think I have a right to explain whether it is a specific injury or general injury."

The following then occurred (R. 15):

> "By the Court: I will declare a mistrial if you mess with me two minutes and a half, and fine you besides.
> "By Mr. Fisher: That is all right. We take exception to the conduct of the Court."

Cold print cannot depict expression and inflection; otherwise the record might contain what presumption must supply, namely the affront to the Court's dignity contained in the utterance of the phrase "That is all right." It was this which was the culmination of the causes moving the Court to impose the $25.00 fine as appears from the following (R. 15):

> "By the Court: That is all right; I will fine you $25.00."

There follows a charge by Mr. Fisher that the Court is fining him "for trying to represent my client," an attempt to reargue the improper matter, insistence that the Court was acting for his own "satisfaction" and because he knew he held the advantage, and a culminating demand for right to state position before the "audience" (R. 15):

> "By. Mr. Fisher: If that will give you any satisfaction.
> "By the Court: That is $50.00; that is $25.00 more. Mr. Sheriff come get it. Pay the clerk $50.00.

"By Mr. Fisher: You mean for trying to represent my client?

"By the Court: No, sir; for contempt of Court. Don't argue with me.

"By Mr. Fisher: I am making no effort to commit contempt, but merely trying to represent the plaintiff and stating in the argument—

"By the Court: Don't tell me. Mr. Sheriff, take him out of the courtroom. Go on out of the courtroom. I fine you three days in jail.

"(fol. 22) By Mr. Fisher: If that will give you any satisfaction; you know you have all the advantage by you being on the bench.

"By the Court: That will be a hundred dollar fine and three days in jail. Take him out.

"By Mr. Fisher: I demand a right to state my position before the audience.

"By the Court: Don't let him stand there. Take him out."

In the foregoing progression, improper argument to disobedience to explicit insult, we have the traditional basis for the long-established type of punishment assessed by the Trial Court.

The power of a Trial Court to punish summarily for contempt committed in its presence is an anciently recognized and still essential power. EX PARTE TERRY, 128 U.S. 289, 302-304; BEVAN v. KRIEGER, 289 U.S. 459, 465; ELLENBECKER v. PLYMOUTH COUNTY, IOWA, 134 U.S. 31. A related habeas corpus proceeding is collateral, as held by the Court below, and as it has been from ancient origins, and cannot prevail unless the contempt order was void. EX PARTE TERRY, supra, 306-8. The findings of the Court of first instance, where the facts are such as to confer jurisdiction to make the determination, cannot be revised or annulled by another court on application for habeas corpus (IBID. 310). "Confidence

must be reposed somewhere," EX PARTE KEARNEY, 7 Wheat. 38, 45, quoted in EX PARTE TERRY, supra, 309. See also UNITED STATES v. MOORE, 294 Fed. 852, certiorari denied, 264 U.S. 581.

These procedures of contempt and habeas corpus were established long prior to the enactment of the Fourteenth Amendment, and were not prohibited thereby. PLLENBECKER v. PLYMOUTH COUNTY, IOWA, 134 U.S. 31, 36-39; BIVAN v. KRIEGER, 289 U.S. 460; RUBIN v. STATE, 192 Wis. 1, 211 N.W. 926; MCCARTHY v. CLANCY, 110 Conn. 482, 148 A. 551.

Accordingly, the Supreme Court of Texas, on the record, took such action as has long been recognized as proper by this and other Courts. With this, we close, with a request that this Court disregard certain factual charges and insinuations contained in the Petition and supporting brief and which have no basis in the record. Particularly, we allude to the *ex parte* relation of an off-the record conference between the Court and Petitioner's Counsel (Petition, p. 9), at which the case was discussed and Respondent was not represented, in which conference, startling in its very occurrence if it occurred, astonishing words came from the mouth of our late highly respected Chief Justice, which words are contrary to the opinion he and his colleagues wrote. The baseless and ugly conjecture concerning racial animosity, and allusion to a relationship which is not improper, and a censure thereof in POSTAL MUTUAL INDEMNITY CO. v. ELLIS, 169 S.W. (2d) 482, in which no such censure appears (Brief, 35), are of similar nature. Speculation, and accusation of a nature with the spirit manifested by Petitioner in the contempt episode, are used to direct attention from the plain facts of record and their meaning.

WHEREFORE, Respondent prays that the Court refuse to

issue its Writ of Certiorari in this cause, and that all other relief sought by Petitioner be denied.

Respectfully,

R. C. PACE,
Sheriff of Jasper County, Texas,
Respondent;

R. C. Pace

Robert W. Hillen

ROBERT W. HILLEN,
District Attorney, Jasper County, Texas,
Jasper, Texas;

Quentin Keith

QUENTIN KEITH,
Perlstein Bldg.,
Beaumont, Texas